Filed 2/4/19 P. v. Meria-Deleon CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BYRON ENRIQUE MERIDA-DELEON, Defendant and Appellant.	E068958 (Super.Ct.No. RIF1506214) OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Andrew Mestman and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Byron Enrique Merida-Deleon on four counts involving the sexual abuse of a victim under the age of 10. During trial, a video

recorded interview of the victim (Jane Doe, born in 2008) with the Riverside County Child Assessment Team (RCAT interview) was played for the jury. Defendant contends that the trial court erred by overruling his Evidence Code[1] section 352 objection to the RCAT interview. He also contends that instructing the jury with CALCRIM No. 318, regarding prior statements as evidence, "compounded the error" of admitting the RCAT interview. We find no error and affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

At trial, the prosecution presented evidence that defendant was close to Doe's family; he had been a friend of Doe's mother since before Doe was born, both Doe's parents considered him part of the family, and Doe called him "Uncle." Defendant lived with Doe's family for about a year—the record is ambiguous as to exactly when this occurred, but Doe was apparently seven years old or younger during this period—and after moving out, defendant continued to visit about three or four times per week. Defendant was often alone in the house with Doe while her parents worked, or effectively alone because Doe's father was sleeping or her older brother was in another part of the house.

Doe's mother testified that on September 18, 2015, several months after defendant had moved out, she caught Doe kissing her younger cousin "like when a woman kisses a man." When confronted, Doe told her mother that defendant kissed her that way. She also told her mother that defendant kissed her "down here," pointing to her genital area.

---

[1] Further undesignated statutory references are to the Evidence Code.

She also said "'[t]he thing that the boys have, he puts it in here, and it hurts me, and he kisses me.'"

On September 23, 2015, a doctor conducted a forensic medical examination of Doe. The doctor, who testified at trial, observed injuries that were "highly suspicious for sexual abuse," and which could not occur from regular activities. Doe's hymen had unusual, distinctive areas of redness. Doe's anal area and perineum showed scarring from imperfectly healed tearing of the skin, indicative of "significant trauma." Doe's anal area also had some partially healed tears, as well as a fresh superficial abrasion and blood spot, and the doctor observed an area of venous blood pooling in her perineum.

A police search of defendant's electronic devices recovered numerous videos and photographs. Three of the videos depicted an adult engaging in sexual activity with a child. Although the faces of the individuals in the three videos are not always visible, police identified them as defendant and Doe by comparison of distinctive moles on their bodies, and also distinctive clothing. The three videos were each played for the jury.

Doe, then aged nine, testified at trial. She described how, while defendant was living with her family, when she and defendant were alone together, he would touch her in places she did not want to be touched. Using his hand, he would touch her genitals and buttocks. He would put his mouth on her mouth, and also on her genitals. He also would penetrate her orally, vaginally, and anally with his penis.

The prosecution's questioning of Doe, however, was intentionally brief; the prosecutor explained outside the jury's presence that he had been told that Doe "is very vulnerable because of the counseling she's going into," so he was "trying to minimize as

much of the testimony as possible and just get out the bare minimum . . . ." The prosecution's stated intention was to present additional details by means of the RCAT interview. The defense's cross-examination of Doe was limited to only a few questions, largely focused on whether Doe had previously discussed her testimony with anyone, rather than the substance of her testimony.

After Doe testified, the approximately 40-minute long, video-recorded RCAT interview, which was conducted in September 2015, was played for the jury over the defense's objection.[2] During the interview, Doe told her interlocutor that on more than one occasion when they were alone, defendant used his hand to touch her on the genitals, both over and under her clothing, and both with and without penetration. More than once, he had put his mouth on her mouth, or put his mouth on her genitals. More than once, he penetrated her orally, vaginally, or anally with his penis. Defendant sometimes would take pictures of Doe after taking her clothes off. He also showed her videos of people engaged in sexual activity, including both adults and children.

Defendant did not testify at trial, or present any other form of affirmative defense.

The jury convicted defendant of two counts of sexual intercourse or sodomy of a child 10 years old or younger (Pen. Code, § 288.7, subd. (a)) and two counts of oral copulation or sexual penetration of a child 10 years old or younger (*id.*, § 288.7, subd. (b)). The trial court imposed a total sentence of 80 years to life.

---

[2] The People's passing assertion, made without reference to the record, that the defense failed to object to admission of the RCAT interview is without merit. Indeed, elsewhere in their briefing, the People concede (with citation to the record) that defendant did object to admission of the RCAT interview.

II. DISCUSSION

Defendant contends that the trial court erred by admitting the RCAT interview into evidence. We find that the RCAT interview was admissible pursuant to section 1360, and the trial court did not abuse its discretion by overruling defendant's objection pursuant to section 352.

A. *Applicable Law*

Section 1360 creates a limited exception to the hearsay rule in criminal prosecutions for a child's statements describing acts of child abuse or neglect, including statements describing sexual abuse. (§ 1360; *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1327.) "Section 1360 safeguards the reliability of a child's hearsay statements by requiring that: (1) the court find, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances surrounding the statement(s) provide sufficient indicia of reliability; (2) the child either testifies at the proceedings, or, if the child is unavailable to testify, other evidence corroborates the out-of-court statements; and (3) the proponent of the statement gives notice to the adverse party sufficiently in advance of the proceeding to provide him or her with a fair opportunity to defend against the statement." (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.)

Section 352 provides that the court "in its discretion" may exclude otherwise admissible evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is "'substantially'" more prejudicial than probative only if it "'poses an intolerable "risk

to the fairness of the proceedings or the reliability of the outcome" [citation].'" (*People v. Lindberg* (2008) 45 Cal.4th 1, 49.) "Undue prejudice" in this context is not the prejudice or damage to a defense that naturally flows from probative evidence; rather, it is evidence that "'uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

We review the trial court's evidentiary rulings under the deferential abuse of discretion standard. (*People v. Roberto V., supra*, 93 Cal.App.4th at pp. 1366-1367.) We will disturb the trial court's ruling only if the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Clark* (2016) 63 Cal.4th 522, 572.) Further, we assess the trial court's ruling, not its reasoning, and affirm if it is correct on any ground. (*People v. Brooks* (2017) 3 Cal.5th 1, 39; see also *People v. Zapien* (1993) 4 Cal.4th 929, 976 [""'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'""].)

B. *Analysis*

1. *Admission of RCAT Interview*

The record demonstrates that the statutory prerequisites for admission of the RCAT interview pursuant to section 1360 were met. Doe's statements in the RCAT

interview were not admissible under any other statute or court rule. (§ 1360, subd. (a)(1).) The trial court conducted a hearing outside the presence of the jury and determined that the time, content, and circumstances of the RCAT interview provided sufficient indicia of reliability. (§ 1360, subd. (a)(2).) Defendant has not argued that this finding was an abuse of discretion. Doe testified at trial. (§ 1360, subd. (a)(3)(A).) And the defense was on notice before trial that the prosecution intended to seek admission of the RCAT interview. (§ 1360, subd. (b).)

Defendant argues that "if the prosecutor wanted to bring the RCAT interview in to 'protect' the victim from harm from testifying, it behooved the prosecutor to brief and argue unavailability," rather than "presenting avowedly bare-bones direct testimony" and then playing the more substantial RCAT interview for the jury. He characterizes the RCAT interview as "the huge evidentiary tail, wagging the tiny testimonial dog." There is no authority, however, for the proposition that out-of-court statements exempted from the hearsay rule under section 1360 may only be used for limited purposes, or only to supplement more expansive trial testimony. Rather, such statements are simply evidence, not barred by the general hearsay exclusionary rule, which may be used by either the prosecution or the defense like any other evidence. (See *People v. Brodit, supra,* 61 Cal.App.4th at pp. 1317, 1323, 1336 [affirming conviction on charge of continuous sexual abuse of a child even though "much of the evidence" against the appellant consisted of the out of court statements of a child victim who testified at trial, admitted under section 1360].) Further, although the defense refrained from extensive cross-

examination of Doe for obvious tactical reasons, it could have obtained (or challenged) her testimony on matters in the RCAT interview.

Defendant further contends that, even if the RCAT interview was admissible under section 1360, the trial court nevertheless should have excluded it pursuant to section 352. In his view, the RCAT interview "had no probative value . . . so any prejudice would inherently swamp any probative value." Not so. The interview was highly probative of the primary issue at trial, in that Doe describes to the interviewer multiple incidents of defendant sexually abusing her as charged. (See § 210 [relevant evidence is ". . . evidence . . . having any tendency in reason to prove or disprove any disputed fact . . . ."].) The circumstance that the RCAT interview was similar, in this regard, to her trial testimony does not render it any less probative. (See *People v. Scheid* (1997) 16 Cal.4th 1, 16 ["Subject to the trial court's authority to exclude cumulative evidence under [section 352], it is immaterial for purposes of determining the relevance of evidence that other evidence may establish the same point."].)

Furthermore, the RCAT interview was not, as defendant would have it, merely cumulative of Doe's trial testimony. One of the main themes of the defense, both in cross examining Doe and in closing argument, was that Doe's trial testimony could have been the product of adult suggestion, rather than Doe's independent recollection. The RCAT interview, both in its similarities to and differences from Doe's trial testimony, was relevant to the jury's analysis of the merits of this aspect of the defense's case. The RCAT interview was conducted more than a year and a half before trial, closer in time to

the alleged offenses and long before Doe was, as defense counsel put it, "prepped for trial."

Another main theme of the defense was attempting to introduce reasonable doubt as to whether defendant and Doe were the individuals depicted in the three videos that were recovered from defendant's electronic devices and played for the jury. Neither the prosecution, nor the defense, asked Doe any questions on this subject during her trial testimony. Doe's statements in the RCAT interview that defendant sometimes used his phone to take pictures of her with her clothes off tends to support, albeit indirectly, the prosecution's view that the videos depicted defendant sexually abusing Doe.

Additionally, we disagree with defendant's assertion on appeal that the RCAT interview was unduly prejudicial. The interview was not particularly lengthy, and it was no more likely to evoke an emotional bias against the defendant than Doe's trial testimony. (*People v. Karis, supra*, 46 Cal.3d at p. 638.)

In short, we do not find that the trial court's decision to allow the RCAT interview to be played for the jury was erroneous. It was admissible pursuant to section 1360, and the trial court reasonably determined that it should not be excluded pursuant to section 352.

2. *CALCRIM No. 318*[3]

Defendant does not contend that CACRIM No. 318 is an incorrect statement of the law. Rather, he argues that the jury should not have been instructed with it because "no one was impeaching [Doe], and the judge only admitted the RCAT interview for general 'information' and demeanor." Defendant is mistaken, in several respects.

First, defendant forfeited the issue by failing to object to the instruction in the trial court. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1225.)

Second, it is not true that "no one was impeaching [Doe] . . . ." To be sure, neither party confronted Doe with her out-of-court statements while she was testifying. But, as noted above, the defense explicitly argued that Doe's statements in the RCAT interview differed from her testimony at trial in ways that indicated her trial testimony was the product of adult suggestion, rather than her own recollection. The defense emphasized that in the RCAT interview, Doe responded to many questions with "'I don't know'" or "'I don't remember.'" Thus, the *defense* urged the jury to use the RCAT interview precisely as instructed by CALCRIM no. 318, to evaluate whether Doe's in court testimony was believable, and to consider whether information conveyed in her earlier statements was true.

---

[3] CALCRIM No. 318, as given to the jury, provides: "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; AND [¶] 2. As evidence that the information in those earlier statements is true."

Finally, the trial court did not admit the RCAT interview for any limited purpose, but simply as evidence not excluded by the hearsay rule because of section 1360, and exercising its discretion not to exclude it pursuant to section 352. The trial court acknowledged that the evidentiary value of the RCAT interview included both the "actual information that [Doe] conveys," and her "demeanor, the way she conveys the information . . . ." We have no quarrel with this analysis.

We conclude that defendant forfeited any claim that the trial court erred by instructing the jury with CALCRIM No. 318, but in any case, defendant's arguments in support of such a claim are without merit.

III. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

RAMIREZ
P. J.

MCKINSTER
J.